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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940

No. 983

DOROTHY BRUNET,
Petitioner,

vs.

S. S. KRESGE COMPANY, a corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

and

BRIEF IN SUPPORT THEREOF.

SAMUEL A. RINELLA,
Counsel for Petitioner.

HARRY G. FINS,
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No.

DOROTHY BRUNET,

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vs.

S. S. KRESGE COMPANY, a corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

Your petitioner, DOROTHY BRUNET, represents to this Honorable Court as follows:

SUMMARY STATEMENT OF THE MATTER INVOLVED.

An action was brought by the petitioner, a citizen of the State of Illinois, against the respondent, a citizen of the State of Michigan, in the District Court of the United States for the Northern District of Illinois, East-

ern Division, to recover damages in the sum of Ten Thousand ($10,000.00) Dollars for personal injuries to the plaintiff, occasioned by the negligence of the respondent in negligently causing and allowing the stairway in the respondent's store to become and remain in a slippery and dangerous condition, in that certain accretions of ice, water, snow and slush were allowed to remain on the stairway for a long period of time. (R. 2 and 3.)

Nine witnesses testified on behalf of the petitioner, and five witnesses testified on behalf of the respondent, and there was a conflict in the evidence as to the question of negligence and contributory negligence. (Brief, pages 7-11.) At the close of all the evidence, the respondent made a motion for a directed verdict, which motion the trial court denied without reservation (R. 124.) The jury brought in a verdict in the sum of Five Thousand ($5,000.00) Dollars. (R. 131.) The respondent made a motion for a new trial and for judgment notwithstanding the verdict, which motions were denied by the trial court. (R. 132-135.) The trial court then entered judgment on the verdict. (R. 136.)

The respondent appealed to the United States Circuit Court of Appeals for the Seventh Circuit and that Court reversed the judgment with directions to the District Court "to dismiss on the merits." (R. 155.)

REASONS RELIED ON FOR GRANTING OF CERTIORARI.

I.

The entry of the order by the United States Circuit Court of Appeals for the Seventh District, directing the trial court to enter an order dismissing the proceedings on the merits was a denial to the petitioner of her right to trial by jury as guaranteed by the Seventh Amendment of the Constitution of the United States. (Brief, p. 12.) This question is of great importance, and, your petitioner believes, warrants a review by the Supreme Court of the United States.

II.

The United States Circuit Court of Appeals for the Seventh Circuit construed Rule 50 (b) of the Federal Rules of Civil Procedure so as to override the Seventh Amendment of the Constitution of the United States, which construction is directly contrary to the law as expounded by the Supreme Court of the United States in *Slocum* v. *New York Life Insurance Co.*, 228 U. S. 364, and *Aetna Insurance Co.* v. *Kennedy*, 301 U. S. 389. (Brief, pp. 12-14.) The interpretation of Section 50 (b) of the Federal Rules of Civil Procedure has been a difficult problem in many Federal Courts and has recently come to the attention of this Honorable Court on several occasions. In the case of *Conway* v. *O'Brien*, 61 S. Ct. 634, 85 L. Ed. 574 and in the case of *Berry* v. *United States*, 61 S. Ct. 637, 85 L. Ed. 576 (both cases decided by this Court on March 3, 1941, but official citations are not yet available), this Honorable

Court granted Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit for the purpose of construing Section 50 (b) of the Federal Rules of Civil Procedure regarding problems similar to that presented by the case at bar. However, in both of the above cited cases this Honorable Court reversed the Circuit Court of Appeals for the Second Circuit on other grounds and, therefore, found it unnecessary to interpret Section 50 (b). The application of this section, in so far as it affects the power of the Circuit Courts of Appeal to deny a litigant a new trial, is still a dilemma to the Federal Courts, and, your petitioner believes, the situation warrants the granting of a Writ of Certiorari in the case at bar because of its importance.

III.

The United States Circuit Court of Appeals, in its decision, did not follow the common law of the State of Illinois as enunciated by the Supreme Court of the State of Illinois, in accordance with the holding of this Honorable Court in the case of *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64. In deciding upon the questions of negligence and contributory negligence, the United States Circuit Court of Appeals for the Seventh Circuit has thrown the local law of Illinois in a state of confusion by following a case which was decided by one of the four Appellate Courts of Illinois instead of following the law as decided by the Supreme Court of Illinois. (Brief, pp. 14-17.) In this connection, your petitioner wishes to call the attention of this Honorable Court to the fact that the four Illinois Appellate Courts are tribunals of intermediary appellate jurisdiction and that the Supreme Court of Illinois is the highest court of last resort in the State.

JURISDICTION.

The judgment of the United States Circuit Court of Appeals for the Seventh Circuit was entered on November 1, 1940. (R. 155.) The petition for rehearing of the petitioner was denied by the United States Circuit Court of Appeals for the Seventh Circuit on November 29, 1940. (R. 158.) A stay of mandate for a period of ninety (90) days was granted by the United States Circuit Court of Appeals for the Seventh Circuit on December 19, 1940. (R. 162.) On the 17th day of February, 1941, an order was entered by the Supreme Court of the United States, as follows (R. 163):

> "Upon Consideration of the application of counsel for the Petitioner,
>
> It Is Ordered that the time for filing petition for certiorari be, and the same is hereby, extended to, and including, 28th day of April, 1941,
>
> It Is Further Ordered that the mandate of the Circuit Court of Appeals be stayed providing a petition for certiorari is filed by the 28th day of April, 1941. Should such a petition be filed by such date then this stay of the mandate to continue pending final disposition of the case by this Court.
>
> /S/ Frank Murphy,
> Associate Justice of the Supreme Court of the United States."

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925. (28 U. S. C. A. Section 347.)

PRAYER.

Wherefore, your petitioner, Dorothy Brunet, prays this Honorable Court to issue a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit, commanding the said United States Circuit Court of Appeals for the Seventh Circuit to transmit the record in No. 7283 of said court, entitled *Dorothy Brunet, plaintiff-appellee* v. *S. S. Kresge Company, a corporation, defendant-appellant,* to this Court to be reviewed by this Honorable Court, and upon such a review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit be reversed and remanded to that Court with instructions to proceed in accordance with the views of this Honorable Court.

DOROTHY BRUNET,
Petitioner.

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